Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

Ellak Molnar; Socorro M. Molnar,

Petitioners,

vs.

United States of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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31pp

QUESTIONS PRESENTED

A. WHETHER THE FERES DOCTRINE, FERES V. UNITED STATES, 340 U.S. 135 (1950) SHOULD BAR CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 2671-2688 FOR SERVICE MEMBERS WHO ARE ON MEDICAL LEAVE, CONVALESCENT LEAVE, MEDICAL HOLD, PERMANENT CHANGE OF STATION LEAVE ("PCS") AND/OR TEMPORARY DISABILITY RETIREMENT LEAVE?

B. WHETHER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 2671-2688 BARS A CLAIM OF A SERVICE MEMBER WHOSE CONTRACTUAL DISCHARGE DATE OF MAY 19, 1996 WAS NOT HONORED AND WHO WAS PLACED ON MEDICAL HOLD UNTIL OCTOBER 30, 1997, AND WHO RECEIVED NEGLIGENT MEDICAL CARE CAUSING INJURY DURING THIS MEDICAL ABSENCE FROM ACTIVE DUTY?

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The Petitioners respectfully ask that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is an unpublished opinion cited as 2000 WL 331946 (6th Cir. (Ohio)), and is reprinted hereto at App. A-1. The opinion of the United States District Court for the Northern District of Ohio (Oliver, Jr., S.) is not officially reported. This decision was filed as Civil File Number 1:98 CV 1127 and is reprinted hereto at App. A-4.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 23, 2000, and is reprinted in the appendix at App. A-1. Jurisdiction to review by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254.4

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Federal Tort Claims Act sets forth the manner and mechanism by which individuals can sue the United States Government in 28 U.S.C. §§ 2671-2680.

STATEMENT OF THE CASE

Ellak Molnar was born on May 2, 1965. In September of 1991, Ellak Molnar enlisted in the United States Navy with official service date of May 19, 1992. Mr. Molnar's official contractual discharge date was scheduled for May 19, 1996, for a total of four years of service.

On May 5, 1995, Ellak Molnar detached from his command in Japan and was placed on permanent change of station ("PCS") leave from May 5, 1995 until June 30, 1995. During this 45-day leave, Ellak Molnar returned home to Cleveland, Ohio, and was to be married. Following leave, Ellak Molnar was to report to Whidbey Island, Washington. Affidavit of Ellak Molnar, App. A-18.

Following his placement on PCS status, Ellak Molnar, in May of 1995, began to develop progressive worsening pain in his buttocks for which he sought emergency care at the Veteran's Hospital in Cleveland, Ohio. Affidavit of Ellak Molnar, App. A-18. Mr. Molnar was diagnosed with a pilonidal cyst or a perirectal abscess. Affidavit of Ellak Molnar, App. A-19. Surgery was performed to drain this infection or abscess. Plaintiff's More Definite Statement, App. A-12.

Ellak Molnar was hospitalized at the University Hospital Bedford Medical Center from May 25, 1995 until May 30, 1995. Plaintiff's More Definite Statement, App. A-13. Follow up home care was provided for his surgery from May 31, 1995 until June 23, 1995 through University Home Care Services.

On June 13, 1995, Ellak Molnar was seen in consultation at the VA in Cleveland, Ohio, and it was recommended that he be placed on convalescent leave[1] from May 30, 1995

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[1] Convalescent Leave is discussed in C.F.R. Section 32, 728.4, "Policies." In Subsection (d), it is stated that the period of authorized absence may be granted where military members are not fit for duty.

through July 10, 1995 because he could not travel until at least July 10, 1995. Plaintiff's More Definite Statement, App. A-13. In July of 1995, Ellak Molnar's orders to report to Washington were cancelled. Ellak Molnar's detailer stated there was nothing that could be done unless he was cleared for full duty by a military physician. Affidavit of Ellak Molnar, App. A-21. Noteworthy is the fact that there is no medical evidence linking Mr. Molnar's pilonidal cyst abscess to his subsequent condition involving his spinal disc for which the claim of negligence was asserted and is unrelated to his subsequent medical negligence claim.

On September 29, 1995, Ellak Molnar reported to Great Lakes Naval Hospital because he was experiencing shooting pains down his right leg. Mr. Molnar was referred to Patterson Air Force Base facility on November 6, 1995, while on convalescent leave that had unofficially continued. Plaintiff's More Definite Statement, App. A-13.

In January of 1996, Ellak Molnar consulted a private civilian physician, Dr. Elghazawi, and was diagnosed as suffering from a right L5-S1 herniated nucleus pulposus, and this civilian physician recommended immediate surgery. Plaintiff's More Definite Statement, App. A-13. A seven month delay followed within the Military health care system until July of 1996 when Ellak Molnar was seen at the National Naval Medical Center in Bethesda, Maryland. Mr. Molnar was finally surgically treated by the military for his herniated disc. Plaintiff's More Definite Statement, App. A-14. It is Ellak Molnar's contention that the United States committed medical malpractice in failing to diagnose and promptly treat Ellak Molnar's herniated disc from January 1996 through July of 1996, during which time the seven month delay caused Ellak Molnar to develop permanent bowel, bladder, and sexual dysfunction.

Ellak Molnar was originally scheduled to be discharged from the military on May 19, 1996, and wrote in March of 1996 begging to be discharged on his scheduled date in

accordance with his contract. Affidavit of Ellak Molnar, App. A-24. The military placed him on a medical hold, or in a limbo situation until October 30, 1997, almost a year and a half later when Ellak Molnar was finally granted a Temporary Disability Retirement Leave ("TDRL").

Ellak Molnar filed a Standard Claim 95 Form in November of 1997, claiming that the United States departed from the standard of care in providing medical treatment to him through July of 1996. Claim for Damage, Injury or Death Claim 95 Form, App. A-15. Specifically, Ellak Molnar alleged that the military physicians failed to diagnose his condition in a timely manner and failed to intervene and perform necessary surgery after the diagnosis of Ellak Molnar's herniated disc in January of 1996, and continuing through the time the surgery was finally performed in July of 1996. Ellak Molnar asserts that his claim accrued on or about July 7, 1996 at the time of his surgery, almost two months after Ellak Molnar should have been discharged from the military.

The case was filed pursuant to the Federal Tort Claims Act ("FTCA") 28 U.S.C. § 2671 *et seq*. An appeal to the Sixth Circuit in this matter was taken from a judgment entered on December 30, 1998, dismissing Plaintiff's claims pursuant to the Order of the Honorable Solomon Oliver, Jr. The Sixth Circuit affirmed the dismissal by Order filed March 23, 2000. Molnar v. United States, 2000 WL 331946 (6th Cir. (Ohio)).

REASONS FOR GRANTING THE WRIT

This Court in Feres v. United States, 340 U.S. 135 (1950) established the test for determining whether a claim is barred under the Federal Tort Claims Act. This landmark decision was last affirmed by this Court in a 5-4 decision in United States v. Johnson, 481 U.S. 681 (1987). There have been inconsistent rulings in the various federal appellate courts as

to how the Feres Doctrine should apply to service members who are injured on some form of leave, i.e. liberty, medical hold, furlough, and/or temporary disability retirement leave ("TDRL"). This issue is one of importance to the administration of justice in that without Supreme Court judicial review of this decision, there are no clear guidelines for the lower federal courts to follow when service members are injured on some form of leave or absence from their duty command post. This Court needs to establish a test to be followed by the lower federal courts to avoid confusion and inconsistent rulings.

ARGUMENT

A. WHETHER THE FERES DOCTRINE, FERES V. UNITED STATES, 340 U.S. 135 (1950) SHOULD BAR CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 2671-2688 FOR SERVICE MEMBERS WHO ARE ON MEDICAL LEAVE, CONVALESCENT LEAVE, MEDICAL HOLD, PERMANENT CHANGE OF STATION LEAVE ("PCS") AND/OR TEMPORARY DISABILITY RETIREMENT LEAVE?

Mr. Molnar requests this Court to establish a test and establish precedent as to whether a service member on some form of leave should be able to assert a claim under the Federal Tort Claim Act ("FTCA") for acts of negligence committed by the United States during the absence from the service member's active duty command. The Federal courts have adopted two drastically different approaches in making this determination.

The approach used by the Sixth Circuit in Molnar v. United States, 2000 WL 331946 (6th Cir. (Ohio)) is the black and white hard-line approach, namely: Was the Plaintiff officially discharged from service at the time of the

malpractice or negligence or not? If not, there is no possibility of recovery and the case is dismissed. Madsen v. United States, 841 F.2d 1011 (10th Cir. 1987) and Ricks v. United States, 842 F.2d 300 (11th Cir. 1988) The other distinctly different approach is to look at the member's relationship with the military and acknowledge that the relationship cannot always be easily pigeon-holed. This approach recognizes a continuum from full active duty on one end to complete discharge on the other. This second case-by-case approach allows each court to decide whether the Plaintiff's relationship with the military is such that the concerns of Feres are not present and recovery under the FTCA is permitted. Where the connection with the military is tangential and insubstantial, this case-by-case approach allows recovery and a finding that none of the Feres' concerns are implicated.

The United States Supreme Court has previously directed that each FTCA claim be evaluated on a case-by-case basis. United States v. Shearer, 473 U.S. 52 (1985) Therefore, the second approach should be the law of this land, but is not consistently followed by the lower federal courts. Rather than simply applying the black and white approach that denies all claims if the status of the service member is one of active duty, cases adopting the case-by-case approach look at the continuum. Bradley v. United States, 161 F.3d 777 (4th Cir. 1998), Harvey v. United States, 884 F.2d 857 (5th Cir. 1989), Cortez v. United States, 854 F.2d 723 (5th Cir. 1988), and Adams v. United States, 728 F.2d 736 (5th Cir. 1984)

For example, the Fifth Circuit Court of Appeals in Harvey found that a medical hold was equivalent to a discharge and that Harvey could bring his FTCA claim, holding that a service member on medical hold is not part of the active duty military force. Harvey at 86-861. *See also* Labash v. United States, 668 F.2d 1153 (10th Cir. 1982) *et cert.* denied, 456 U.S. 1008 (1982), the Court noting that if a Plaintiff is on leave or in an inactive status at the time of the

injury, a claim under the FTCA will survive. *See also* Cortez v. United States, 854 F.2d 723 (5th Cir. 1988), a service member on TDRL and was allowed to recover under the FTCA.

In Fleming v. United States, 186 F.3rd 697 (6th Cir. 1999), the Sixth Circuit reversed a lower federal court's dismissal of a FTCA claim against the Postal Service predicated on the Feres Doctrine. Fleming was a Major in the Army traveling to Fort Knox to report for duty when he was struck by a Postal delivery truck. The Sixth Circuit held that although the "ultimate destination" was an active duty post, Fleming was not on active duty when injured. Id. Mr. Molnar asserts the Sixth Circuit's opinion in Fleming is inconsistent with its rejection of his claim, because he too was not at an active duty command post when injured.

Ellak Molnar's relationship with the military was tangential and insubstantial at the time of the negligence. His contractual date of discharge was May 19, 1996. Ellak Molnar had been on medical hold, convalescent leave, and in medical limbo because of his ongoing need for medical care which developed while on permanent change of station leave in May of 1995. Ellak Molnar's orders to report to Washington State were cancelled. Mr. Molnar was in a unique situation within the military where no one claimed him and he had a lack of any relationship with any military post. Ellak Molnar contends that the malpractice occurred during the time he was on medical leave or in this limbo or suspension from active duty post.

B. WHETHER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 2671-2688 BARS A CLAIM OF A SERVICE MEMBER WHOSE CONTRACTUAL DISCHARGE DATE OF MAY 19, 1996 WAS NOT HONORED AND WHO WAS PLACED ON MEDICAL HOLD UNTIL OCTOBER 30, 1997, AND WHO RECEIVED NEGLIGENT MEDICAL CARE CAUSING INJURY DURING THIS MEDICAL ABSENCE FROM ACTIVE DUTY?

The Sixth Circuit's decision in Molnar suggests that only fully discharged service members may bring FTCA claims and that Ellak Molnar's claim should be summarily denied, solely because the malpractice occurred at a military facility and he was technically an active duty service member. The Sixth Circuit adopted the black and white approach, because Mr. Molnar had not yet been discharged. The irony of this is that the military refused to discharge Mr. Molnar, even after March of 1996, when he begged them to keep the contractual date of his discharge so that he could obtain the medical care that he needed. It seems ludicrous that the military can claim a defense based upon an active duty status, when the facts establish that Mr. Molnar was in military suspension or hold. Mr. Molnar was absent from a military chain of command, whether you call it a medical hold, convalescent leave, or another title, and should not be barred under the Feres Doctrine.

The Feres decision has set out three bases for its doctrine which were reaffirmed by the Supreme Court in 1987 in United States v. Johnson, 481 U.S. 681 (1987). The first rationale is that the relationship between the government and members of its armed forces is "distinctively federal in character" and, therefore, the application of local tort law to this relationship would be inappropriate. In Johnson, this Court stated that when a service member is injured incident because of his military relationship with the government, it

makes no sense to permit the fortuity of the situs of alleged negligence to affect the liability. Johnson, 481 U.S. at 689-690.

The second rationale of the Feres Doctrine is that there is alternative compensation systems for military personnel available. Johnson, 481 U.S. at 689-690. Typically, no litigation is necessary to obtain these benefits. Feres v. United States, 340 U.S. 135, 145 (1950)

Third, the Feres Doctrine is intended to prevent claims arising incident to service because "if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." Johnson, 481 U.S. at 689-690. It has often been stated that the only rationale of the Feres Doctrine which has retained any validity is the third rationale. *See*, United States v. Shearer, 473 U.S. 52 (1985).

The Feres decision did not overrule this Court's decision in Brooks v. United States, 337 U.S. 49 (1949). In Brooks, members of the armed forces who were injured while on furlough in motor vehicle accidents could sue the United States, because the injuries were not caused by their active duty service. Id. at 52. In United States v. Brown, 348 U.S. 110 (1954), this Court allowed Plaintiff, who was receiving treatment at a VA hospital after discharge from the military, to bring a claim under the FTCA, because the Plaintiff was not subject to military discipline and that the negligent act giving rise to injuries was not incident to Plaintiff's active service. In Brown, the argument was rejected that a Plaintiff may not recover under the FTCA simply because they received medical treatment within the military health system.

In this case, Mr. Molnar's claim should not be barred under the Feres Doctrine when one applies the test set forth in Johnson, 481 U.S. 681. At the time of the alleged negligence in 1996, Ellak Molnar was on medical leave recovering from injuries. He was scheduled to be discharged on May 19, 1996. The Military kept him beyond his contractual

discharge date, despite his request to be discharged. His medical hold status did not disrupt military procedures, nor involve a situation distinctly federal in character. Under these circumstances, Ellak Molnar should be allowed to recover and not be barred by the Feres Doctrine. Thus, the Sixth Circuit in Molnar erred in finding Mr. Molnar was barred by the Feres Doctrine.

CONCLUSION

For the reasons set forth above, Petitioner is requesting that this Petition for Certiorari be granted.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELLAK MOLNAR and SOCORRO M. MOLNAR,	)	
Plaintiffs-Appellants,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
UNITED STATES OF AMERICA,	)	NORTHERN DISTRICT OF OHIO
Defendant-Appellee.	)	

BEFORE: BATCHELDER and DAUGHTERY Circuit Judges, and STEEH, District Judge.*

PER CURIAM. The plaintiffs, Ellak and Socorro Molnar, appeal from the ruling of the district court dismissing their claims against the government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Ellak had brought suit alleging that the Department of the Navy negligently failed to diagnose and treat promptly a serious medical condition that left Molnar with both bladder and bowel incontinence. Socorro Molnar also sued the Navy, seeking damages for the loss of her husband's consortium. The district court held that

* The Hon. George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

it lacked subject matter jurisdiction under the "*Feres* doctrine," developed in the Supreme Court opinion in *Feres v. United States,* 340 U.S. 135 (1950). There the Court concluded "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

Ellak Molnar entered into active service with the United States Navy on May 19, 1992, and was scheduled for discharge exactly four years later. At the end of that four years, however, he was continued on active duty, in a limited duty status and on "medical hold," due to a medical condition, the care for which by Navy doctors gave rise to his malpractice claim. Specifically, Molnar claimed that the military physicians had failed to diagnose and treat his herniated disc problem "until approximately July 7, 1996," some seven weeks after his discharge date of May 19, 1996. On July 7, he underwent surgery at the Bethesda Naval hospital and remained on active duty until he was transferred to "temporary disability retired list" status on October 30, 1997.

Despite Molnar's argument that this circuit should extend the analysis employed by other courts and hold that he is not barred from filing suit under the *Feres* doctrine in the circumstances of this case, we believe we are constrained by existing Sixth Circuit precedent to affirm the district court's judgment. As we have previously recognized:

> Review of . . . Supreme Court precedent makes it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus

> between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

Major v. United States, 835 F.2d 641, 644-45 (6th Cir. 1987) (footnote omitted). In fact, "included in the term 'incident to service' [used in *Feres*] is medical treatment received by a soldier on active duty." *Skees v. United States,* 107 F.3d 421, 424 (6th Cir. 1997). Consequently, "claims by active duty servicemen against the United States for negligent treatment by medical staff at a military hospital are barred by the *Feres* doctrine." *Id.*

Having had the benefit of oral argument, and having studied the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in finding that the plaintiff was on active duty at all times relevant to his malpractice claim and was therefore barred from bringing suit under the Federal Tort Claims Act. It follows that Socorro Molnar cannot maintain her derivative claims against the government, and that the district court was correct in dismissing the complaint in its entirety. Because the reasons why judgment should be entered for the defendant have been fully articulated by the district court, the issuance of a detailed opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court upon the reasoning set out by that court in its order entered on December 30, 1998.

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NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELLAK MOLNAR, et al.,	)	Case No.: 1:98 CV 1127
	)	
Plaintiffs	)	
	)	
v.	)	JUDGE SOLOMON OLIVER,
	)	JR.
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant	)	ORDER

Plaintiffs, Ellak Molnar ("Ellak") and his wife Socorro Molnar ("Socorro") (collectively referred to as "Plaintiffs"), filed this action against Defendant, United States of America ("Defendant"), alleging that Ellak suffered severe medical injuries as a result of the military's failure to treat him in a timely manner and that Socorro has sustained injuries as a result of the loss of her husband's services, consortium, and companionship. Defendant now moves to dismiss Plaintiffs' claims for lack of subject matter jurisdiction. For the reasons that follow, the court grants Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction (Doc. No. 12).

I. FACTS

In May 1995, Ellak began experiencing excruciating pain in the cleft of his buttocks while on leave between duty stations on his way to reassignment at Whidbey Island, Washington. His leave began on May 5, 1995, and he was supposed to report to his new station in Washington after June 30, 1995. On May 24, 1995, Ellak presented himself at the Veteran's Administration ("VA") Hospital, where he was treated by out-patient surgery for a rectal abscess. On May 25, 1995, Plaintiff was treated at University Hospital ("UH")-Bedford until he was discharged from the hospital on May 30, 1995. On June 13, 1995, Ellak followed up with a consultation at the VA Hospital, where they recommended that he not travel until at least July 10, 1995. On July 11, 1995, Ellak was admitted to UH-Bedford for further surgery and was discharged on July 13, 1995. On August 17, 1995, Ellak had hemorrhoid surgery at UH Medical Center. On September 13, 1995, the VA Branch Medical Clinic of Cleveland evaluated Ellak due to shooting pains down his right leg. From September 18, 1995, to October of 1995, Ellak had a number of visits at the VA Branch Medical Clinic for treatment of the pain in his right leg. On November 6, 1995, Ellak was referred to Naval Hospital in Great Lakes, Illinois. Over the course of several months, Ellak sought consultation at Wright Air Force Base and was also examined by a private physician, Dr. Ahmed Elghazawi, who in a January 9, 1996 report, recommended immediate surgery. On July 5, 1996, Ellak was seen at National Naval Medical Center in Bethesda, Maryland with a diagnosis of right L5-S1 herniated nucleus pulposus and was operated on at that time. Any subsequent treatment occurred at National Naval Medical Center in Bethesda, Maryland. During this time period, Ellak was unassigned to any command and was placed on medical hold and limited duty status.

On October 30, 1997, Ellak, who was originally scheduled for discharge on May 19, 1996, was granted temporary disability retirement leave ("TDRL"). Before his discharge, Ellak had been on active duty since May 19, 1992, a period of five years, five months and twelve days.

On November 12, 1997, Ellak filed an administrative claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346(b), on Standard Form 95 with the Department of the Navy, alleging that a delay in treatment for his condition had caused him permanent nerve damage which resulted in permanent bowel and bladder incontinence and back pain with radiculopathy. The claim further alleged that the claim accrued on or about July 7, 1996. Socorro's claims were not included in Ellak's administrative claim. On November 17, 1997, the Department of the Navy denied Ellak's administrative claim on the ground that it was jurisdictionally barred by the *Feres* doctrine. On May 15, 1998, Plaintiffs filed their complaint in this court. On September 23, 1998, the court held a case management conference for the parties. At this conference, the parties stipulated that:

> Plaintiff was in the military at all times relevant to the claims alleged in the complaint. The events so alleged took place between May 19, 1992, and October 30, 1997. The administrative claim in this case was filed on November 12, 1997. None of the events which are the subject of the complaint occurred during the period between October 30, 1997, and November 12, 1997. The alleged acts complained of occurred at military medical facilities and occurred as a result of acts by military health care providers.
>
> Case Management Conference Order, September 28, 1998, p.2.

On October 19, 1998, at Defendant's request for a more definite statement, Plaintiffs filed such statement.

II. LAW AND ANALYSIS

In this case, Defendant argues that Plaintiff's claims should be dismissed because Ellak was an active duty service member at the time he received treatment at military medical facilities, where Ellak alleges that negligence occurred, and the *Feres* doctrine bars military personnel from suing the United States for alleged torts that occur during the course of an activity incident to service. Defendant argues that Socorro's claim is barred for the same reasons.

The FTCA provides, in relevant part, that: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674 (1994). Excepted from this general waiver of sovereign immunity are claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j). This exemption was broadened by the Supreme Court in *Feres v. United States,* 340 U.S. 135 (1950) (consolidated and decided along with *Jefferson v. United States* and *United States v. Griggs).* In *Feres,* the Supreme Court held that the "Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. As the Supreme Court noted in *Feres,* included in the term "incident to service" is medical treatment received by a soldier on active duty. *See id.* at 137. The three rationales that underlie the *Feres* doctrine are as follows. First, "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character,'; thus, where "a service member is injured incident to service - that is, because of his

military relationship with the Government - it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *United States v. Johnson*, 481 U.S. 681, 689-90 (1987) (citations omitted). Second, the existence of "generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id.* Third, "*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the 'type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* (citations omitted).

Given the Supreme Court's ruling in *Feres*, the Sixth Circuit has held on numerous occasions that claims by active duty service members against the United States for negligent treatment by medical staff at a military hospital are barred by the *Feres* doctrine. *See Skees v. United States*, 107 F.3d 421, 424 (6th Cir. 1997); *Irvin v. United States*, 845 F.2d 126, 130 (6th Cir. 1988); *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987). Indeed, two of the three cases comprising the *Feres* trilogy involved claims for negligent treatment of service members. *See Feres*, 340 U.S. at 137. However, the Sixth Circuit has also noted that the *Feres* doctrine may not bar claims from servicepersons who have been discharged or are on furlough. *See Skees*, 107 F.3d at 424.

The Fifth Circuit has made a further exception to the *Feres* bar. More specifically, the Fifth Circuit has held that a service member's status on TDRL means that alleged malpractice by military medical personnel is not "incident to service." *See Harvey v. United States*, 884 F.2d 857 (5th Cir. 1989); *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988). The Fifth Circuit states that TDRL status is not equal to active duty status "because active duty service requires that a service member meet certain health and fitness standards not required

of a service member on TDRL." *Harvey*, 884 F.2d at 860; *see also Cortez*, 854 F.2d at 725-27. Other circuits, however, have held that a service member's status on TDRL does not mean that the alleged malpractice by military medical personnel is not "incident to service." *See Kendricks v. United States*, 877 F.2d 1201 (4th Cir. 1989), *cert. dismissed*, 493 U.S. 1065 (1990); *Ricks v. United States*, 842 F.2d 300 (11th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). Ellak argues that the Fifth Circuit exception should be applied to his case. According to Ellak, his case should not be barred by the *Feres* doctrine because he was not under the direct military control of any particular military station and was in limbo status with respect to both his medical condition and duty stations. Furthermore, Ellak argues, unlike the cases cited by Defendant, his claim is "not only one for medical malpractice in that it was negligent treatment at any one particular military medical facility, but rather that it was a lack of treatment by various medical facilities that caused the delay and the ultimate surgery that was necessary and resulted in permanent bowel and bladder incontinence." Plaintiff's Response To Defendant's Motion To Dismiss, p.5.

After careful consideration, the court finds that the facts of Ellak's case require that his claims be barred by the *Feres* doctrine. To begin, unlike the plaintiff in *Cortez*, Ellak was not placed on TDRL status until after he received medical treatment from military personnel. Furthermore, Ellak's status as a service member on medical hold and limited duty (throughout the period of his treatment) is not sufficient to overcome the *Feres* bar because, unlike the plaintiffs in *Harvey* and *Cortez*, from the beginning of his treatment until May 19, 1996 (his original date for discharge), Ellak was supposed to report to another station in Washington to return fully to active duty. *See Kendrick*, 877 F.2d at 1205-06; *Berry v. United States*, 772 F. Supp. 563, 565 (D. Kan. 1991). Thus, Ellak's position on medical hold and limited duty was more than "a processing point on the road to either separation or

disability discharge." *Harvey*, 884 F.2d at 860; *see Adams v. United States*, 728 F.2d 736, 741 (5th Cir. 1984) (noting that, in medical malpractice actions, the proper inquiry is: was the plaintiff's "treatment intended to return him to military service?").

A question remains, however, as to whether Ellak's status on medical hold and limited duty after his original discharge date on May 19, 1996, is sufficient to overcome the *Feres* bar.[1] The court finds that it does not. The Sixth Circuit has held that a service member's status as an active duty serviceperson is controlling. *See Skees*, 107 F.3d at 424-25. In fact, Sixth Circuit caselaw (and the caselaw from the majority of circuits that have dealt with this issue) suggests that medical treatment by military personnel (or in this case, the alleged failure to provide timely medical treatment) because of a person's status as a service member alone requires a *Feres* doctrine bar. *See id.; see also Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991) (holding that the plaintiff's claim must fail because her husband had "enjoyed the use of the naval hospital 'solely by virtue of his status as a serviceman'"); *Appelhans v. United States*, 877 F.2d 309, 311-12 (4th Cir. 1989) ("The fact that [the plaintiff's] injury occurred as a result of medical treatment by military doctors, however, conclusively demonstrates that injury was 'incident to service.'"); *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987) (dismissing the claim of the plaintiff where the plaintiff was on terminal leave pending retirement because "injury to active duty service members as a result of military medical care has been regarded as incident to service"); *Scheppan v. United States*, 810 F.2d 461 (4th Cir. 1987) (finding that the plaintiff's injuries occurred in the course of service in spite of the fact that she was medical leave at the time of the injury).

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[1] Any conclusion reached as to these claims would also naturally apply to Ellak's claims before his original date of discharge.

In sum, because Ellak was treated by medical military personnel while he was on active duty status (though on medical hold and limited duty), because part of Ellak's treatment occurred so that he may return to fully active duty at a station in Washington, and because Ellak allegedly did not receive (or was denied) proper and timely medical treatment from military medical personnel because of his military status, the court grants Defendant's Motion To Dismiss (Doc. No. 12) on Ellak's claims.

For the same reasons, the court grants Defendant's Motion To Dismiss (Doc. No. 12) on Socorro's claim. The Sixth Circuit has held that a claim for loss of consortium in this context is derivative of a service member's injury in the course of activity incident to service and is barred by the *Feres* doctrine. *See Skees,* 107 F.3d at 425-26. Additionally, the court dismisses Socorro's claim on the ground that she failed to comply with the jurisdictional requirements of 28 U.S.C. §2675(a) by failing to file an administrative claim with the Department of the Navy. *See Rucker v. United States Department of Labor,* 798 F.2d 891, 893 (6th Cir. 1986).

CONCLUSION

The court grants Defendant's Motion To Dismiss (Doc. No. 12).

IT IS SO ORDERED.

s/ Solomon Oliver, Jr.
UNITED STATES DISTRICT JUDGE

FILED
98 OCT 19 PM 1:14
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELLAK MOLNAR, et al.	)	Case No.: 1:98CV1127
	)	
Plaintiffs	)	Judge Solomon Oliver, Sr.
	)	
v.	)	**PLAINTIFFS' MORE**
	)	**DEFINITE STATEMENT**
UNITED STATES OF AMERICA	)	
	)	
	)	
Defendant	)	

Now come the Plaintiffs by and through undersigned counsel and in compliance with court order, submit the following information to supplement the original Complaint with this More Definite Statement of the Claim.

1. In May, 1995, Plaintiff began experiencing excruciating and progressively worse pain in the cleft of his buttocks while on leave between duty stations when he had detached from his command in Japan on his way to reassignment at Whidbey Island, Washington.

2. On May 24, 1995, Plaintiff Ellak Molnar, presented himself at the Veteran's Administration Hospital where he was treated by out-patient surgery for rectal abscess.

3. On May 25, 1995, Plaintiff was treated at University Hospital-Bedford Medical in the emergency room and admitted until discharge on May 30, 1995 for an ischiorectal abscess.

4. On June 13, 1995 he followed up with a consultation at the VA Hospital where they recommended that he not travel until at least July 10, 1995.

5. On July 11, 1995, Plaintiff Ellak Molnar was admitted to University Hospitals-Bedford Medical Center for further surgery. He was discharged on July 13, 1995.

6. On August 17, 1995, Plaintiff had hemorrhoid surgery at University Hospital Medical Center.

7. On September 13, 1995, the VA Branch Medical Clinic in Cleveland evaluated Mr. Molnar due to shooting pains down his right leg. The record indicated that at that time they would seek an orthopedic consult with "Great Lakes".

8. From September 18, 1995 through October of 1995, Plaintiff Ellak Molnar had a number of visits at the Branch Medical Clinic in Cleveland for treatment of pain down his right leg.

9. On November 6, 1995 Mr. Molnar was referred to the Naval Hospital at Great Lakes, Illinois. He was treated there through November 7, 1995.

10. Over the course of the next several months Plaintiff was sent to seek consultation at Wright Air Force Base as well as examined by a private physician on his behalf, Dr. Ahmed Elghazawi, who in a report January 9, 1996, recommended immediate surgery.

11. On July 5, 1996, Mr. Molnar was seen at National Naval Medical Center in Bethesda, Maryland with a diagnosis of right L5-S1 herniated nucleus pulposus and was operated on at that time. Subsequent treatment and evaluations were carried on at Bethesda, Maryland Naval Medical Center subsequent to that time.

12. Plaintiff's allegations are that the various military medical facilities at which he was treated failed to recognize in a timely manner that his bowel and bladder incontinence were due to disc herniation. Furthermore, by that time it was recognized and surgery was performed, permanent damage had been incurred by the Plaintiff leaving him permanently incontinent of bowel and bladder.

13. Plaintiff Ellak Molnar was unaware of the permanency of this condition and, therefore, that malpractice previously had occurred, until subsequent to his surgery in July, 1996.

Respectfully submitted,

/s/
ILAN WEXLER, (#0005859)
Attorney for Plaintiffs
ANZELLOTTI, SPERLING, PAZOL & SMALL CO., L.P.A.
21 North Wickliffe Circle
Youngstown, Ohio 44515
Phone: (330)792-6033

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008 EXPIRES 4-30-98

1. Submit To Appropriate Federal Agency:
COMMANDING OFFICER
Naval Legal Service Office Central
206 South Avenue, Suite B
Pensacola, Florida 32508-5100

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
Attorney Ilan Wexler
21 North Wickliffe Circle
Youngstown, OH 44515

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☐ CIVILIAN	05-02-65	Married	Claim accrued on or about July 7, 1996	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

ELLAK MOLNAR was a Petty Officer in the U. S. Navy. In May of 1995, he developed a rectal abscess. During the course of treatment for this problem, he developed low back pain, which was subsequently diagnosed as a herniated disc at L5-S1.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Surgery for the herniated disc was unnecessarily delayed as Petty Officer Molnar was evaluated at various facilities. Surgery was not performed until approximately July 7, 1996. Due to the delay in treatment for this condition, Petty Officer Molnar developed permanent nerve damage resulting in permanent bowel and bladder incontinence and back pain with radiculopathy.

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
Ahmed Elghazawi, M.D.	5500 Broadview Road, Parma, OH 44134
Other witnesses unknown at this time.	

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
-0-	$2,000,000	-0-	$2,000,000

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
ILAN WEXLER Attorney for Ellak Molnar	(330) 792-6033	11-07-97

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-107 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable. PRESCRIBED BY DEPT. OF JUSTICE

BEST AVAILABLE COPY

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), concerning the information requested in the letter to which this Notice is attached.

A. Authority: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. Principal Purpose: The information requested is to be used in evaluating claims.

C. Routine Use: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. Effect of Failure to Respond: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills or medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

INSURANCE COVERAGE

In order that subrogated claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number. ☐ No

N/A

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you obtain this data)

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier (Number, street, city, State, and Zip Code) ☐ No

N/A

U.S. GOVERNMENT PRINTING OFFICE : 1985 O - 494-720

SF 95 (Rev. 7-85) BACK

AFFIDAVIT

Now comes the affiant, Ellak C. Molnar Jr., a.k.a. Ellak Molnar, and after first being duly sworn according to law, states and avers:

1. The attached Plaintiff's Exhibit I is a true and accurate copy of a letter I sent in March, 1996 and it accurately reflects the history of my circumstances as they occurred to that point in time.

2. I was placed on medical hold status during this time period and was unable to perform the duties of my job assignments in the Navy due to my medical condition.

3. The facts set forth in the Statement of Facts in the Response to Defendant's Motion to Dismiss are true and accurate to the best of my knowledge and belief.

Further Affiant Sayeth Naught:

/s/_____
Ellak C. Molnar, Jr.

County of Cuyahoga }
}ss
State of Ohio }

Sworn to and subscribed before me, a notary public, by Ellak C. Molnar, Jr., this 19th day of December, 1998.

s/ Howard E. Skolnick, Esq.
Notary Public

Dear Sir/Madam,

I am writing you to ask of your assistance in resolving a matter of utmost urgency affecting my health, family and my access to proper medical care. I am an active duty Sailor who, while on leave in between duty stations in may 1995, experienced excruciating, progressively worsening pain in the cleft of my buttocks. I had detached from my command in Japan and was home in Cleveland, Ohio for 45 days PCS (Permanent Change of Station) leave from 5 May to 30 June while in transit to VAQ-130 in Washington State. I was to be married while home, and expected to take care of the dependency paperwork when I arrived in Whidbey Island, Washington.

However, By the 18th of May the pain was so severe that I could not walk, an a severe infection from this illness was making me progressively faint and nauseous. I had never been instructed in the procedures for emergent medical care while away from a Military treatment Facility (MTF), so I assumed that the VA Hospital in Cleveland, Ohio would be able to treat me.

However, Upon arrival to the VA. Hospital, the VA. admissions staff informed me that they could not treat me because I was on active duty. They said that they would need prior authorization from the Navy. This was incorrect, because my illness was obviously an emergency, and I was so sick that I could not of contacted anyone at that point. Finally, after insisting that I was very ill, the VA. reluctantly agreed to examine me. This examination came only after waiting for six hours in the examination room while the VA. contacted the Navy Regional Medical Center in Great Lakes for authorization. The Major problem was that when a service member is in between commands, after a detaching endorsement is generated by the last command and before a reporting endorsement is generated by the receiving command, he belongs to no one.

Needless to say, this delayed my treatment. When I was finally examined, I was diagnosed with a pilonidal cyst, or perirectal abscess, which formed a tract of infection surrounding my spinal cord. This abscess had already ruptured internally, and was leaking infection into my lower abdominal cavity. This condition was a result of a internal leakage of the intestinal tract. As you might realize, this type of condition requires surgical procedure to drain the abscess, and it must be performed under sterile conditions while under anesthesia due to the spinal cord.

It is also a very painful procedure and it involved a 4-inch long, 4-inch deep incision to drain the tract around my spine. This should have been performed in a surgical suite under anesthesia by a trained surgeon, but was performed instead by an unsupervised intern on a dirty gurney in the emergency room, with no anesthesia except an order to "bite down on your T-shirt". She then stuffed me with about a yard of packing in my draining abscess and told me to wash up at the sink by (Myself!). I was told to come back three days later for a wound check and dressing change. This same intern then prescribed a pain medication which contained codeine, despite the fact that she had in her possession my complete medical record, with a conspicuous warning label on the front advertising her of my codeine allergy.

When I arrived home I checked the medication in the family drug reference, and the book said it contained codeine. I called the intern at the VA. who said that it was not codeine, but a (codeine derivative), and told to go ahead and take the medication anyway. The next morning, I went in to the bathroom to soak in the tub and repack the wound per the physician's orders, but passed out and became unresponsive. My parents called 911, and I was rushed by ambulance to a nearby University Hospital where I was diagnosed with a severe anaphylactic (allergic) reaction to codeine! They also examined my wound and found that the VA. Hospital had

attempted to drain the abscess from the wrong side and in fact, never drained anything! The abscess was still impacted around my spine. By this time, I was septic low on blood cells and required an IV of a very powerful antibiotic called cipro for two days before I could be taken to surgery to correct the VA's incompetence. The University surgeons found over a cup of infectious fluid still inside my body. I spent a week at the University Hospital, allowed only to leave for a few hours to attend my wedding and released four days later.

Now, I began to worry about being late in reporting to my new duty station in Washington. I called the office in Great Lakes and spoke with the Chief Petty Officer who okayed the initial surgery. I was told that everything was fine, all I needed to do was call the duty Officer at VAQ-130 in Washington State, who would generate a ordermod (order modification) to allow me to report when cleared by the University Physicians for active duty.

I made the call right away from my hospital bed that same day after surgery, and also called my old duty station in Japan. I was told by everyone not to worry, just get better. It was just one of those things that happens, it was beyond my control, just keep everyone informed. Great Lakes told me that once I was able to walk, I need to see the physician at the clinic in the Cleveland federal Building for final evaluation and documentation.

Well, the wound was very slow healing, and six weeks later, after finally getting visited by a nurse to come out to my home for the last 30 days to clean out and re-pack my wound daily, it was discovered that the infection had formed another abscess requiring further surgery. For a third time, I was taken to surgery to reopen the wound and drain the infection. The University surgeon overseeing my case called the Federal Building in Cleveland, I called Washington, Japan and Great Lakes. The prognosis was another six weeks of the same slow healing and daily re-packing.

Now, I had a additional problem. All of our belongings including my wife's furniture and clothing had been moved to Washington State and placed into storage awaiting our arrival. All of my winter uniforms were also in the shipment. Additionally, my wife still had no I.D. card and no medical authorization, since this paper work is usually after arrival at the next duty station. I was not yet upgraded to married BAQ and VHA, to defer the expenses of our apartment. No one would take the responsibility to perform this paperwork since I literally belonged to no one.

Everyone I called said the same thing, "Oh, it will get taken care of at your next duty station. until then, you'll just have to rough it out". Roughing it out meant using all of our wedding money and borrowing money from my parents to cover the expense of a $700.00 a month furnished apartment, utilities, and the expense of buying replacement clothing. I begged the Navy to please send back our belongings due to our unusual situation, but was told this was against policy, that they could do nothing until I belonged to someone. The one thing that I was able to do was take a loan out against my Navy pay check just to have enough money on hand to live.

Now it was time for my third operation. The physician at the Federal Building gave the go ahead for the University to perform another surgery, and as expected, it required a 6-week convalescence Leave. After six weeks, I was again diagnosed with a enclosed fistula requiring more surgery.

Yes, I was looking at yet a fourth operation and another six weeks recovery. So I called Washington State to inform them of the delay and to ask there assistance with my pay and household goods and was asked why I was contacting them, my orders had been cancelled! They told me to contact my detailer to find out what my new orders were.

Well, I called my detailer, who told me that there was nothing that he could do until I was cleared for full duty by a military Physician. I begged him to put me in some sort of permanent duty station so that I could have someone

responsible for me who could clear up my pay and dependency paperwork. He essentially told me, tough! it was just to much paperwork to assign me somewhere until I was released for full duty.

Now I was truly alone! No Money or medical for my wife, no help from the Navy and another surgery to look forward to. I had no choice but to have the fourth surgery and I was again down for yet a additional 6-weeks convalescence. On top of this, the surgeon informed me that he strongly recommended a fifth surgery to correct severe hemorrhoids! The physician at the Federal Building said, Yes, I should have the University perform that surgery also. with yet another long period of convalescence ahead, I knew that I had to get my pay straighten out now, not whenever I was cleared for full duty. The Doctor at the Federal Building, Cleveland told me that since I was under their medical purview, to call Columbus, Ohio. Where the Federal Buildings parent command was, to see if they could help me.

Unfortunately, I was again told that since I did not belong to them, they could not help me. They said that no one could help me until my detailer cut me a new set of orders, and I could then belong to someone.

Now I was at the end of all of my resources, I called the Congressman in my home town. His staff called the Naval Congressional Office in Washington D.C. and suddenly things seemed to take a turn for the better. Now, everyone who couldn't help me before seemed very willing. They fixed my pay and enrolled my wife as a Navy dependent. I was told to bring all of my medical bills from the University Hospital to the Federal Building for processing, and that I now had a new set of orders cut for me, to the Naval Base at Great Lakes. This set of orders, however, was for me to go unaccompanied by my wife for a fitness for duty evaluation, three weeks tops. I have to go alone, leaving my wife in Cleveland still without her clothing and household goods.

While I was sent to go live in a barracks with no facilities for daily sitz baths or repacking of my wounds in some semblance of privacy. I was told that this was my only option. I reported to Great Lakes on September 29th, 1995, but *instead of being rapidly evaluated as promised*, I was placed in a Medical Holding Company, Assigned to the phone watch in the main lobby of the Great Lakes Hospital. My Pay was finally completely straightened out, but the Naval Hospital did not have the necessary services to evaluate or treat me. it seemed that the fifth surgery had left me incontinent, unable to hold my urine or bowel movements. Great Lakes did not have a specialist who was a experienced in this type of nerve compression injury, so I was referred to the Air force Hospital in Dayton, Ohio to see a neurologist. They diagnosed the problem as being a mechanical one (not neurological) and told me to come back in two weeks for additional testing. Now, this involved an un-reimbursed 1200-mile round trip in my own car with a diagnosed lower spine injury!

Once back to Great Lakes, I begged everyone to please allow me to go back to my wife in Cleveland so that I could find a less expensive unfurnished apartment instead of a furnished one that we were forced to rent because our belongings were in storage. This would allow the Navy to release all of our belongings from storage and have then all redelivered to Cleveland. It would also bring back all of our winter clothes, since it was now the middle of winter. After all, my required care was beyond the capability of Great Lakes and Cleveland is closer to Dayton.

Well, a deal was struck to allow me to be assigned to Naval Recruiting District, Cleveland. I had to buy all new winter uniforms, I would have to use my leave time for the move, and the round trip to-and-from Dayton, while still un-reimbursed, was only 400 miles instead of 1200. Additionally, my incontinence was becoming embarrassing in the main lobby of the Naval Hospital. At least in Cleveland, I could clean myself up at home instead of in the rest room of

the Hospital Lobby or the barracks which was shared by 200 other people.

Well, it is now March 1996, almost one year after the disaster at the VA. Hospital. I still have a compressed sciatic nerve from a herniated disk (a result of rough treatment while under anesthesia during my last surgery) and incontinence which a specialist at the world -renowned Cleveland Clinic believes is due to a compressed nerve, NOT a mechanical problem. The specialists at Dayton are stalling until my EAOS in May so that the VA. Hospital will have to fix me, Not the Navy or the Air Force. The VA. Hospital? They started this all!!! I have not been able to participate in an advancement test for the last year, and I have spent over $400.00 so far traveling back and forth to Dayton, sometimes only to repeat a urine test that they had lost. $150.00 in long distance phone bills.

Remember those medical bills that the Federal Building was taking care of? They were lost Twice, still unpaid, and is affecting my credit. All I ask is for the immediate approval for supplemental care to the Cleveland Clinic. They know what is wrong, They can fix me. the Neurologist there says that the condition is worsening with each passing day. Soon it will be irreversible. Please, I have been patient with the system, but it has failed me. I ask for your help to get me the medical care that I need. and just allow me to leave the military as planed in my contract on May 19th 1996.

Very Respectfully,

Ellak C Molnar Jr,
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Supreme Court, U.S.
FILED
SEP 20 2000

No. 99-2032

In the Supreme Court of the United States

ELLAK MOLNAR AND SOCORRO M. MOLNAR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether *Feres* v. *United States*, 340 U.S. 135 (1950), bars a Federal Tort Claims Act suit for alleged negligent medical treatment by the military that occurred when the claimant was on active military duty.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported. The opinion of the district court (A4-A11) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on March 23, 2000. The petition for a writ of certiorari was filed on June 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ellak Molnar (Mr. Molnar) enlisted in the United States Navy on May 19, 1992. He was

scheduled to be discharged four years later. Pet. App. A6. However, his period of active duty was subsequently extended until October 30, 1997. *Ibid.*

In September 1995, Mr. Molnar reported to the Great Lakes Naval Base. Pet. App. A23.[1] He was on active duty status at this time, *id.* at A6, received full military pay, and performed clerical duties at Great Lakes Naval Hospital. *Id.* at A23. While at Great Lakes, Mr. Molnar experienced shooting pains down his right leg and sought treatment at Great Lakes Naval Hospital. Pet. 3. Military medical personnel examined Mr. Molnar over the course of the next several months for that condition, and he eventually sought the opinion of a private physician, Dr. Ahmed Elghazawi. See Pet. App. A13. In a report dated January 9, 1996, Dr. Elghazawi diagnosed Mr. Molnar as suffering from a right L5-S1 herniated nucleus pulposus and recommended immediate surgery. Pet. 3; Pet. App. 5.

Military medical personnel continued to treat Mr. Molnar after that time, and in July 1996, the Navy sent him to the National Naval Medical Center (NNMC) in Bethesda, Maryland, for evaluation. He was diagnosed at Bethesda NNMC as having a right L5-S1 herniated nucleus pulposus, Pet. App. A14, and he underwent surgery for that condition at Bethesda NNMC on July 7, 1996. See *id.* at A2. Mr. Molnar remained on active duty until October 30, 1997, when he was placed on the temporary disability retired list and separated from the Navy. *Id.* at A2-A6.

2. In November 1997, Mr. Molnar filed an administrative claim with the Navy. Pet. App. A15. His

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[1] In May 1995, Mr. Molnar underwent medical treatment for a pilonidal cyst abscess. Pet. 2-3. As the petition notes, this abscess is "unrelated" to the "medical negligence" claims. Pet. 3.

administrative claim alleged that the Navy negligently delayed surgery on the herniated disc. As a result of the delay, Mr. Molnar claimed, he developed permanent nerve damage resulting in permanent bowel and bladder incontinence and back pain with radiculopathy. *Ibid.* The Navy denied petitioner's administrative claim under the *Feres* doctrine, *id.* at A6, which holds that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950).

3. Mr. Molnar then filed the complaint in this case seeking recovery under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. A2-A6. Petitioner Socorro Molnar (Ms. Molnar) also filed a claim for loss of her husband's services, consortium, and companionship based on the same allegations of negligence. *Id.* at A4. Shortly after the complaint was filed, the parties entered into a stipulation of uncontested facts. As part of that stipulation, the parties agreed that Mr. Molnar "was in the military at all times relevant to the claims alleged in the complaint." *Id.* at A6 (citation omitted).

The district court dismissed petitioners' action for lack of subject matter jurisdiction. Pet. App. A4. *Feres*, the court observed, preserves the United States's sovereign immunity in actions brought by servicemembers "where the injuries arise out of or are in the course of activity incident to service." *Id.* at A7 (citing *Feres*, 340 U.S. at 146). The district court also noted that both this Court and the Sixth Circuit have held that the military's medical treatment of an active duty servicemember is an "activity incident to service." *Id.* A7-A8 (citations omitted). Ms. Molnar's claim was

also dismissed because "a claim for loss of consortium in this context is derivative of a service member's injury in the course of activity incident to service and is barred by the *Feres* doctrine," *id.* at A11, and because she did not first file an administrative claim as required under 28 U.S.C. 2675(a). Pet. App. A11.[2]

The district court saw no reason to exempt petitioners' case from these well-established principles. While recognizing that the Fifth Circuit, in *Cortez* v. *United States*, 854 F.2d 723 (1988), did not apply *Feres* to bar a medical malpractice claim by a service member that arose while he was on temporary disability retirement leave (TDRL) status, the district court noted that Mr. Molnar was "not placed on TDRL status until after he received medical treatment from military personnel." Pet App. A9. Nor, the court observed, was Mr. Molnar like the claimant in *Harvey* v. *United States*, 884 F.2d 857 (5th Cir. 1989), who was "on the road to either separation or disability discharge;" the Navy treated Mr. Molnar with the expectation that when healed he would remain on military duty. Pet. App. A9-A10 (quoting *Harvey*, 884 F.2d at 860). As to the continuation of Mr. Molnar's active duty status beyond his original discharge date of May 19, 1996, the court followed Sixth Circuit precedent that "a service member's status as an active duty serviceperson is controlling." *Id.* at A10.

4. The court of appeals affirmed in an unpublished *per curiam* opinion. Pet. App. A1. The court of appeals was not persuaded "that the district court erred in finding that the plaintiff was on active duty at all times relevant to his malpractice claim and was therefore

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[2] Petitioners do not challenge this latter ground in their petition.

barred from bringing suit under the Federal Tort Claims Act." *Id.* at A3.

ARGUMENT

The decisions of the courts below dismissing petitioners' FTCA claims under the *Feres* doctrine are correct and do not conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. In *Feres*, 340 U.S. 135, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. See also *United States* v. *Johnson*, 481 U.S. 681 (1987) (reaffirming *Feres*). The application of *Feres* thus depends on whether the alleged injury resulted from an activity that was "incident to service." It is well-established that the military's medical treatment of an active duty servicemember is "incident to service." Two of the three cases consolidated for this Court's review in *Feres* involved claimants who, while on active duty, sustained injuries from the alleged negligence of military medical providers. See 340 U.S. at 136-138. Accordingly, the lower courts have routinely held that *Feres* bars medical malpractice suits that arose during a claimant's active duty.[3]

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[3] See, e.g., *Borden* v. *Veterans Admin.*, 41 F.3d 763 (1st Cir. 1994); *Wake* v. *United States*, 89 F.3d (2d Cir. 1996); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988); *Appelhans* v. *United* States, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 28 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997); *Selbe* v. *United States*, 130 F.3d 1265 (7th Cir. 1997); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Jackson* v. *United States*, 110 F.3d 1484 (9th Cir. 1997); *Quintana* v. *United States*, 997 F.2d 711 (10th Cir. 1993); *Ricks* v. *United States*, 842 F.2d 300 (11th Cir. 1988), cert. denied,

Petitioners do not question the *Feres* doctrine's validity or its general applicability to military medical malpractice cases. Rather, petitioners contend that *Feres* does not bar Mr. Molnar's claim because he was on limited duty and medical hold when his claims arose. As the district court noted, however, Mr. Molnar was on active duty from his enlistment in 1992 until he was granted temporary disability retirement leave on October 30, 1997. Pet. App. A6. Mr. Molnar stipulated that his claims arose during this time period. *Ibid.* "Limited duty" does not remove a serviceperson from active duty, but is a temporary status ordered when "the prognosis is that the member can be restored to full [military] duty" within a reasonable period of time, usually 24 months or less. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4C: Department of the Navy Disability Evaluation* para. 11 (Mar. 8, 1990) (*SECNAV 1850.4C*); *cf.* Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4D: Department of the Navy Disability Manual* § 1008(b) and (b)(1)(a) (1998) (*SECNAV 1850.4D*).[4]

Contrary to petitioners' assertions, the courts of appeals agree that *Feres* bars medical malpractice claims brought by a serviceperson who, like Mr. Molnar, was on active duty and not effectively discharged when the injuries arose. Petitioners point out, see Pet. App. A6, that some circuits "view duty status as a continuum ranging from active duty to discharge." *Schoemer* v. *United States*, 59 F.3d 26, 29 (5th Cir. 1995). Those

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490 U.S. 1031 (1989); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983)

[4] The pertinent parts of the above instructions are reproduced in the Appendix, *infra*, 1a, 1a-3a.

circuits, however, still apply *Feres* when a claimant was at the "active duty" end of the continuum at the time the alleged medical malpractice occurred. The Fifth Circuit, for example, may apply *Feres* "if the serviceman's duty status falls somewhere in the middle of the continuum" between active duty and discharge, *id.* at 29, but "*require*[s] application of *Feres* to medical malpractice cases when the serviceman is on active duty at the time of the alleged malpractice." *Id.* at 29 n.2 (citations omitted).

The cases cited by petitioners, see Pet. 6-7, did not involve claims that arose when a servicemember was on active duty and not effectively discharged. Two involved service persons placed on TDRL—a status that the Fourth Circuit held to be in "sharp contrast" with active duty. *Bradley* v. *United States*, 161 F.3d 777, 781 (4th Cir. 1998) (*Feres* applies to service members on TDRL with regard to treatment of medical conditions arising out of pre-TDRL status). See also *Cortez*, 854 F.2d 723 (*Feres* does not prevent an action for injuries arising while member is on TDRL). But see *Ricks* v. *United States*, 842 F.2d 300 (11th Cir. 1988) (*Feres* applies to those on TDRL). Under TDRL status, a service person is "entitled to retirement pay, [is] not on active duty, and [is] not subject to being recalled to active duty." *Bradley*, 161 F.3d at 781. See also 10 U.S.C. 1202 (1994 & Supp. IV 1998).[5] The applicability of *Feres* to servicemembers on TDRL is not at issue in this case. Mr. Molnar was not removed

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[5] If a person on TDRL remains unfit for duty for five years, the person is placed on permanent retirement status. If a person is found to be fit for duty within that five-year period, the person is given the option of reenlisting or losing the TDRL benefits. *Bradley*, 161 F.3d at 781.

from active duty and placed on TDRL status until October 30, 1997, which he stipulated was after his claims arose. See Pet. App. A6.

The other cases on which petitioners rely involved findings that the servicemember's status was "tantamount to discharge." *Harvey*, 884 F.2d at 860. In *Harvey*, the plaintiff was on medical hold for disability processing—"a processing point on the road to either separation or disability discharge." *Ibid.* The Fifth Circuit noted that plaintiff was initially denied entry into the military hospital where the alleged medical malpractice later occurred because he lacked military identification; only after the military issued him a permanent disability retirement identification was plaintiff allowed to enter. *Id.* at 858, 860-861. In *Adams* v. *United States*, 728 F.2d 736 (5th Cir. 1984), the serviceman had been court-martialed and sentenced to a bad conduct discharge for drug possession. He was not receiving Army pay, "was on a status described as 'indefinite excess leave,'" and had received a "Notice of Separation" from the Army, although he had failed to report to an army base for formal separation. *Id.* at 737-738. The serviceman then sought treatment at a government hospital, apparently being admitted on the basis of his expired military identification. *Id.* at 738. The Fifth Circuit held that *Feres* did not bar claims by the serviceman's survivors based on medical malpractice at the hospital because "the Army had discharged [the serviceman] to the full extent of its ability to do so." *Id.* at 739.

Mr. Molnar's status was not "tantamount to discharge." During the relevant time period he was receiving military pay and performing military duties

commensurate with his physical condition.[6] See Pet. App. A23. The district court noted another distinction between the "tantamount to discharge" cases and Mr. Molnar's situation. In *Adams* and *Harvey*, medical care was not provided with the intent of returning the servicemember to military service. See *Harvey*, 884 F.2d at 860 n.18; *Adams*, 728 F.2d at 741. In contrast, the Navy's care of Mr. Molnar was provided in anticipation that he would continue his full military duties within a reasonable period of time.[7] See *SECNAV*

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[6] The petition wrongly contends that Mr. Molnar was "absent from a military chain of command" during the relevant period, "whether you call it a medical hold, convalescent leave, or another title." Pet. 8. All members of the military are subject to the Uniform Code of Military Justice and the military chain of command while on active duty status (*Solorio* v. *United States*, 483 U.S. 435 (1987); see also *United States* v. *Imler*, 17 M.J. 1021 (N-M.C.M.R., 1984) (member of Navy was subject to court-martial for offenses committed while on medical hold because he was on active duty)), and Mr. Molnar was subject to direct orders when he reported to military medical facilities for treatment and when he carried out his assigned duties while on limited duty. See Pet. App. A23 (describing limited duty assignments).

Moreover, there is no record that Mr. Molnar was ever placed on "convalescent leave." Mr. Molnar has maintained throughout this suit that he was on medical hold and/or limited duty status during the relevant period. See C.A. App. 43.

[7] Petitioners also contend that the Sixth Circuit decision below conflicts with another decision by that court of appeals—*Fleming* v. *United States Postal Serv.*, 186 F.3d 697 (6th Cir. 1999). This misconstrues the rule that resulted in dismissal of petitioners' claims. It is not that *Feres* bars any tort action arising while a service member is on active military duty, but rather that a medical malpractice action alleging negligence by the military and arising when a service person is on active duty is necessarily an injury "incident to military service" because the medical treatment results from the claimant's "military relationship with the Govern-

1850.4C para. 11; App., *infra*, 1a; *SECNAV 1850.4D* § 1008(b); App., *infra*, 2a.

2. Petitioners also seek review of this case because some of the Navy's alleged negligence took place after the discharge date specified in Mr. Molnar's original enlistment agreement. Pet. App. 8. As noted above, his original discharge date was May 19, 1996, and his herniated disc surgery did not occur until July 7, 1996. As a result of an extension of his enlistment period, however, it is undisputed that Mr. Molnar was on active duty status, received military pay, performed military duties, and continued to seek military medical treatment throughout the period in which his claim arose. See pp. 2-4, *supra*.

Moreover, the extension was entirely proper. Navy regulations allow the Navy to extend a service member's contractual separation date for medical reasons with the servicemember's consent, Bureau of Naval Personnel, U.S. Dep't of the Navy, *Naval Military Personnel Manual* art. 1160-050 (July 2000).[8] Petitioners allege that in March, 1996, Mr. Molnar sent a

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ment," *Johnson*, 481 U.S. at 689. *Fleming* did not involve a claim alleging negligence by the military, but rather a claim alleging negligent driving by the U.S. Postal Service. A postal truck hit Fleming's car while Fleming was driving from his home in Louisville to get breakfast at McDonald's or Dairy Queen. *Fleming*, 186 F.3d at 698, 700. Fleming was stationed at Fort Knox, about a forty-five minute drive from his home in Louisville. *Id.* at 698. The court held that it was unable to "conclude, at this stage of the litigation, that plaintiff's injury arose during an activity incident to military service." *Id.* at 699. Yet even if *Fleming* were in tension with the decision in petitioners' case, it "is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[8] A copy of this regulation is reproduced in the Appendix, *infra*, 3a-4a.

"Dear Sir/Madam" letter requesting immediate approval for supplemental care at a private clinic and that he be allowed to leave the military as planned in his contract on May 19, 1996. See Pet. 8; Pet. App. A24. He does not, however, identify to whom he sent this letter, and his having sent the letter does not establish that in May he withheld consent from the Navy's decision to extend his enlistment. Shortly after sending the above letter, Mr. Molnar was scheduled to be examined by experts at the Bethesda NNMC. He reported to that facility voluntarily, and obtained the surgery for his herniated disc there in July 1996—almost two months after his original separation date. See p. 2, *supra*. These actions confirm that Mr. Molnar was not retained in the service beyond his original separation date without his consent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2000

APPENDIX

1. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4C: Department of the Navy Disability Evaluation* para. 11 (Mar. 8, 1990), provides in pertinent part:

> 11. Processing Time Standards. * * * * *
>
> a. Medical Evaluations. * * * * *
>
> (1) Placement on Temporary Limited Duty (TLD) if the prognosis is that the member can be restored to full duty. The period of TLD shall be the number of months needed, applying generally accepted medical standards of practice, to correct the incapacity. The period of TLD shall not exceed 24 months. If the period of TLD is greater than 12 months, the MTF shall notify CHNAVPERS or CMC, as applicable. The period of TLD may not be extended or renewed except with the approval of the CHNAVPERS or CMC based on a medical evaluation that the additional months of TLD will be sufficient to restore the member to full duty. Upon completion of the authorized TLD, the member will be returned to duty or referred to the PEB.

2. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4D: Department of the Navy Disability Evaluation Manual* § 1008(b) (Dec. 23, 1998), provides in pertinent part:

> **1008 Medical Board Evaluations And Temporary Limited Duty Processing Time Standards**

a. Medical Board Evaluations. A member may be removed from full military duty for up to 30 days of light duty for the purpose of evaluation or treatment of a medical condition. If the member is unable to return to full military duty at the end of 30 days of light duty, the member will be placed in MTF Medical Hold for up to 30 additional days, pending evaluation by a Medical Board for the purpose of placement on TLD or referral to the PEB.

b. Temporary Limited Duty (TLD). Members should be placed on TLD when the prognosis is that the member can be restored to full military duty within a reasonable period of time, usually 16 months or less. The period of TLD shall be the number of months needed to correct the incapacity, applying generally accepted medical standards of practice.

(1) U.S. Navy

(a) Active Duty. TLD periods shall not exceed 16 months. Extensions may be authorized by BUPERS (Pers-821) on a case-by-case basis. If TLD is originally granted for 8 months, and an extension or renewal is desired, the MTF shall submit the request to BUPERS (Pers-821). Any extension or renewal of TLD greater than 8 months must be approved by BUPERS (Pers-821) based on a medical evaluation that the additional months of TLD will be sufficient to restore the member to full duty. Upon completion of the authorized TLD, return the member to duty or refer to the PEB.

(b) Naval Reserve. There is no Temporary Limited Duty for members in a Ready Reserve Status.

3. Bureau of Naval Personnel, U.S. Dep't of the Navy, *Naval Military Personnel Manual* art. 1160-050 (July 2000), provides in pertinent part:

Voluntary or Involuntary Extension of Enlisted Personnel Beyond Expiration of Enlistment, Fulfillment of Service Obligation, or Expiration of Tour of Active Service

* * * * *

Extension for Medical Care

Members in the Regular Navy, Naval Reserve, and Fleet Reserve on active duty other than training duty of less than 30 days, who are in need of medical care or hospitalization as a result of disease or injury incident to the service and not due to their own misconduct, may be retained with their consent beyond the date of their normal expiration of active obligated service. Such consent shall be entered on the NAVPERS 1070/613, and signed by the member concerned. Tacit consent to retention may be assumed in cases of mental incompetency or physical incapacity where the member is unable affirmatively to indicate the member's desires, pending notification of and authorization for retention from the member's next of kin. Members retained for medical care or hospitaliza-

tion under this article may be retained until they have recovered to the extent that would enable them to meet the physical requirements for discharge and reenlistment or until it shall have been ascertained that the disease or injury is of a character that recovery to that extent is impossible. Members for whom tacit consent to retention is assumed ordinarily will not be retained in excess of 6 months beyond the date of their normal expiration of active obligated service. Further retention may be authorized in meritorious cases upon proper recommendation accompanied by the supporting facts.